

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FCC 00M-24
 00050

In re Applications of)	MM Docket No. 99-153
)	
READING BROADCASTING, INC.)	File No. BPCT-940407KF
)	
For Renewal of License of)	
Station WTVE(TV), Channel 51)	
Reading, Pennsylvania)	
)	
and)	
)	
ADAMS COMMUNICATIONS CORPORATION)	File No. BPCT-940630KG
)	
For Construction Permit for a New)	
Television Station to Operate on)	
Channel 51, Reading, Pennsylvania)	

O R D E R

Issued: March 24, 2000 Released: March 28, 2000

Pursuant to Order FCC 00M-22, March 22, 2000, Sidley & Austin ("S&A") submitted documents for in camera review under claimed attorney client and/or work product privileges. Responsive Comments were submitted on March 23, 2000, by Adams Communications Corporation ("Adams").¹ Comments from Reading Broadcasting, Inc. ("Reading") and from S&A in response to Adams' Comments were received throughout the day on March 24, 2000, and Adams also replied to S&A's response.

¹ The purpose of this Order is to rule on privileges asserted for documents submitted in camera. Adams has expanded its Comments to argument on the adequacy of document production and argument on the need for more time to prepare for hearing. That has caused Reading to respond with equal vigor. Those extraneous matters are not addressed here. Completion of discovery and the question revising procedural dates will be considered in a prehearing conference to be set for Tuesday, March 28, 2000 at 10:00 a.m.

In Camera Production

S&A produced documents in camera on March 22, 2000, in two batches: The first batch contains S&A billing statements interspersed with exchanges of correspondence between attorney and client and between attorneys working on the same client matter. Certain select items of draft correspondence are deemed to be privileged. The supplemental batch contains billing statements and descriptive logs for legal services performed relating to Micheal Parker's company, Partel Inc., and Station KCBI during the period January 29, 1991, to September 19, 1991. For reasons stated below, it is concluded that there is no privilege available for billing statements and descriptive summaries in transmittals which do not disclose facts from a clients or advice given to a client based on those facts.

Waived Documents

S&A represents in its transmittal letter dated March 22, 2000:

Reading Broadcasting, Inc. ("Reading") and Mr. Micheal Parker ("Parker") have waived the attorney-client privilege with respect to specific applications to which Mr. Parker was a party, including the August 10, 1992 application for consent to assignment of license of International Broadcast Station KCBI, Dallas, Texas to Two If By Sea Broadcasting, Inc. (File No. BALIB – 9208100M).

It is expected that the waived materials have already been furnished by S&A to counsel for Adams. If not, those documents voluntarily waived as to privilege must be produced to Adams' counsel forthwith.

Privilege Not Waived

S&A asserts the attorney-client privilege and attorney work product doctrine with respect to application dated November 30, 1990, for assignment of KCBI to Christine E. Shaw ("Shaw Assignment"). S&A asserts that the privileges are not voluntarily waived because Parker was not a party to the Shaw Assignment and there are no related disclosures of Parker's conduct in dealings with the Commission. S&A seems to be taking the position that there will be no waiver of documents relating to Reading as to which Parker was not a party and which do not relate to disclosures about Parker's conduct in dealing with approved assignment applications. It appears, however, that the Shaw Assignment documents are responsive to the discovery subpoena.

Discussion On Privilege

There are distinct concepts that support attorney-client privilege and the work product doctrine. The purpose of the attorney-client privilege is to protect confidential communications by a client to his or her lawyer for the purpose of obtaining legal advice. WWOR-TV, Inc., 5 F.C.C. Rcd 6261 (1990). The privilege also applies to communications from attorney to client to the extent that it might reveal confidential facts disclosed by the client. Opal Chadwell, 103 FCC 2d 840, 842 (Review Bd.) (1986). But the fact that the subject matter of documents was discussed in confidence with a lawyer does not render the documents describing the subject to become privileged; the privilege attaches only to the substance of the attorney-client communications and does not prevent inquiries into the subject matter. Westhemeco v. New Hampshire Ins. Co., 80 F.R.D. 702, 707 (SDNY 1979). Transmittal letters do not fit that protected category. WWOR-TV, Inc. at 6262. And billing statements and communications relating to terms of lawyers' employment do not qualify for the privilege.² Western Cities Broadcasting, Inc., 6 F.C.C. Rcd 3599 Review Bd 1991); Diversified Indus., Inc. v. Meredith, 572 F. 2d 596 (8th Cir. 1977; en banc 1978).

The work product doctrine protects only documents brought into being in anticipation of litigation. WWOR-TV, Inc. at 6262. Billing statements and transmittals of bills and non-litigation documents in the tendered "privilege logs" do not qualify for the work product exemption. There has been no effort to relate work product to any of the documents under review and there is no indication on the face of the documents that any were prepared with litigation in mind. Compare Georgia Public Telecommunications Commission, 5 F.C.C. Rcd 4560, 4561 (Review Bd 1990). Therefore, none of the documents are found to qualify for protection as work product.

A review was made to determine whether there were disclosures to third persons that might waive the privilege. Adams contends that there was a waiver of otherwise privileged documents in the form of correspondence that was generated after the receipt by Christine Shaw of a letter dated June 20, 1991, from the Enforcement Division of the Mass Media Bureau ("Bureau"). By memorandum dated June 20, 1991, S&A, through Mr. Carb, sent copies of the letter to Micheal Parker and two attorneys: Patricia L. Glaser and Peter A. Cascisato. It appears that the Bureau letter was addressed to Ms. Glaser. The S&A memorandum was concerned with only the time for a response to the Bureau letter and a general description of the subjects inquired about by the letter.

² The billing statements are just statements. There is no meritorious question of privilege to consider with respect to those documents. However, careful consideration was given to S&A letter dated November 14, 1981, concerning the status of payment of S&A's billings. After review, it is determined that there is no legal advice to protect. Also, it is noted that the letter was copied to a third person which may constitute a waiver. In any event, the November 14 letter does not qualify on its face for any privilege.

Thereafter, on April 10, 1991, there were two letters drafted by Mr. Carb for Ms. Shaw to consider in connection with her request for the dismissal of her pending assignment application for KCBI. The memorandum and the Bureau letter deal only with subject matter and are not protected. Similarly, Adams argues that disclosure in S&A's document production of February 22, 2000, of a billing statement that specifically related to "Partel, Inc./KBI Matter" was a waiver of all privileged communications on the subject. But inasmuch as billing statements are not protected by the privilege, there could not be a waiver when billing statements are produced which only identify the subject matter. Communications which qualify for the privilege within that disclosed subject matter still remain privileged. See Westhemeco, *supra*. It follows that the disclosure of documents that are not protected would not waive the privilege related to subsequent advice. The standard for waiver requires a revelation of a part of a privileged communication. Welch Communications, Inc., 4 F.C.C. Rcd 3979, 3981 (1989). The mere description of the subject matter in a transmittal memorandum from an attorney or in a billing statement does not meet the standard for a waiver.

Incomplete Document Production

Unrelated to privilege S&A was instructed to account further for the absence of an "attached diary" to billing statement dated March 21, 1991. Order FCC 00M-22. S&A responded on March 22, 2000, that there was no attached "diary" because the file copy of an invoice that was over nine years old did not have a "diary" attached. S&A is continuing to look and will advise if any responsive item turns up. Adams continues to suggest foul play because other billings of that vintage which reflected "diary attached" actually had the diary attached. S&A responded on March 24, 2000, that it will stick to its guns: There is no diary attached to the billing as it appears in the file for the client account. But ultimately S&A discloses in its March 24 letter: We have found the diary entry for the March 1991 invoice and should be in a position later today to produce that entry."

Rulings on Production of Documents

IT IS ORDERED that except for documents ordered protected below, the documents that are listed on Sidley & Austin Privilege Logs attached hereto as Attachment A and Attachment B SHALL BE PRODUCED to counsel for Adams Communications, Inc. **FORTHWITH** (within 2 hours).

IT IS FURTHER ORDERED that the following documents ARE DEEMED PROTECTED by the attorney-client privilege and NEED NOT BE PRODUCED:

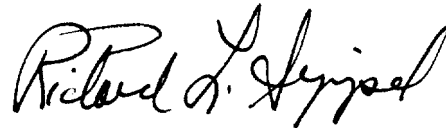
Draft letter dated April 10, 1991, prepared by S&A for the signature of Christine E. Shaw. This draft is fully protected as legal advice.

Draft letter (alternate version) dated April 10, 1991,
prepared by S&A for the signature of Christine E. Shaw.
This draft is fully protected as legal advice.

IT IS FURTHER ORDERED that the "diary entry for the March 1991 invoice"
SHALL BE PROVIDED to counsel for Adams Communications, Inc. **FORTHWITH**
(within 2 hours).

IT IS FURTHER ORDERED that a Prehearing Conference IS SET for **March 28,**
2000 at 10:00 a.m. in a Commission courtroom.

FEDERAL COMMUNICATIONS COMMISSION³

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is fluid and cursive, with the first name "Richard" being more prominent.

Richard L. Sippel
Administrative Law Judge

³ Copies of this Order were e-mailed to all counsel (including Sidley & Austin) on the date of issuance.

PRIVILEGE LOG

<u>TO</u>	<u>FROM</u>	<u>DATE</u>	<u>DOCUMENT TYPE AND SUBJECT MATTER</u>	<u>PRIVILEGE</u>
Micheal L. Parker	R. Clark Wadlow	11/14/91	Letter Regarding Billings	Attorney/Client
Micheal L. Parker	Sidley & Austin	9/19/91	Statement for Professional Services	Attorney/Client
Micheal L. Parker	R. Clark Wadlow	9/19/91	Letter Regarding Statement for Professional Services	Attorney/Client
Micheal Parker	Evan Carb	7/10/91	Fax Cover Sheet	Attorney/Client
Patricia Glaser	Evan Carb	7/10/91	Fax Cover Sheet	Attorney/Client
Patricia L. Glaser cc: Mike Parker Peter Casciato	R. Clark Wadlow	6/21/91	Letter Regarding Christine Shaw	Attorney/Client
Evan Carb	Patricia L. Glaser	6/20/91	Fax Cover Sheet	Attorney/Client
Evan Carb cc: Christine Shaw Peter Casciato	Patricia L. Glaser	6/20/91	Fax/Letter Regarding Christine Shaw	Attorney/Client
Donna R. Searcy	Evan D. Carb	4/10/91	Draft Letter Regarding Refund of Fees Paid for Frequency Coordination	Attorney Work Product
Micheal Parker	Evan D. Carb	4/10/91	Fax Cover Sheet	Attorney/Client
Christine E. Shaw	Evan D. Carb	4/10/91	Letter Regarding Dismissal of Assignment of Short-Wave License With Attached Drafts	Attorney/Client and Attorney Work Product
George Jacobs	Evan D. Carb	1/9/91	Letter Regarding Assignment of License - FCC File No. BALIB-901130MF	Attorney/Client

SUPPLEMENTAL PRIVILEGE LOG

<u>TO</u>	<u>FROM</u>	<u>DATE</u>	<u>DOCUMENT TYPE</u>	<u>PRIVILEGE</u>
Micheal L. Parker	Sidley & Austin	1/29/91	Statement for Professional Services	Attorney/Client
Micheal L. Parker	Sidley & Austin	2/25/91	Statement for Professional Services with attached diary	Attorney/Client
Micheal L. Parker	Sidley & Austin	3/22/91	Statement for Professional Services with attached diary	Attorney/Client
Micheal L. Parker	Sidley & Austin	4/22/91	Statement for Professional Services with attached diary	Attorney/Client
Micheal L. Parker	Sidley & Austin	5/9/91	Statement for Professional Services with attached diary	Attorney/Client
Micheal L. Parker	R. Clark Wadlow	6/25/91	Letter Regarding Statement for Professional Services	Attorney/Client
Micheal L. Parker	Sidley & Austin	6/25/91	Statement for Professional Services with attached diary	Attorney/Client
Micheal L. Parker	Sidley & Austin	7/18/91	Statement for Professional Services with attached diary	Attorney/Client
Micheal L. Parker	Sidley & Austin	8/7/91	Statement for Professional Services with attached diary	Attorney/Client
Micheal L. Parker	Sidley & Austin	9/19/91	Statement for Professional Services with attached diary	Attorney/Client